IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20/10/2004

C O R A M

THE HONOURABLE MR.JUSTICE A.K.RAJAN

W.P.No.11681 OF 1997

Tvl.Ascard Spinners (P) Limited,
rep.by its Managing Director,
Manalur, Sivagangai District. .. Petitioner

-vs-

The Commercial Tax Officer,
Sivagangi. .. Respondent

PRAYER : Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of certiorari as stated therein.

For petitioner :: Mr.P.Radhakrishnan

For respondent :: Mrs.Rani Selvam, GA (Taxes)

:O R D E R

The prayer in the writ petition is to issue a Writ of Certiorari, calling for the records on the file of the respondent in CST No.499319 /94-95, dated 31.12.1996 and quash the same as illegal, without jurisdiction and without authority of law.

2. The petitioner is a spinning mill manufacturing Cotton and Cotton Yarn. For the assessment year 1994-95, the petitioner reported the total and taxable turnover of Rs.1,80,000/- under the Central Sales Tax Act. The petitioner during that year effected consignment sales to the tune of Rs.8,30,000/-, but it did not report the same in the monthly statement since it is not liable to tax. But, the second respondent assessed the said consignment sales turnover and levied tax on that. The petitioner's taxable turnover for the year 1994-95 was determined at Rs.10,10,000/- taxable at 2% as against the reported taxable turnover of Rs.1,80,000/- by Order dated 30.10.1996. In view of the assessment based on the 'Best Assessment', there is a difference in tax to the tune of Rs.16,600/- between the tax assessed and the tax paid by the petitioner. For the said difference, the respondent levied penalty of Rs.24,900/- under Section 12(3)(b)(v) of the TNGST Act read with Sec.9(2-A) of the Central Sales Tax Act, 1956. Section 12(3)(b) of the TNGST Act, 1959 was introduced vide Tamil Nadu Act 25 of 1993 with effect from 28.5.1993. The petitioner filed a writ petition before this Court challenging the provisions of Sec.9(2-A) of the Central Sales Tax Act. The said writ

petition was admitted and the interim stay of recovery of penalty was granted. While so, the respondent has passed the revised order of assessment, dated 31.12.1 996, by which the respondent assessed consignment sale of Rs.8,30,000 /- at 4% on the ground that in the original order it was wrongly assessed at 2%. Thus, in the revised order of assessment, the respondent levied an additional tax of Rs.33,200/-, as also the penalty of Rs.4 9,800/-. According to the petitioner, the consignment sale is not liable to tax. Even against the original assessment order, dated 30.10 .1996, the petitioner has preferred an appeal and the same is still pending. Without waiting for the result in the appeal, the respondent has revised the Order of assessment and levied tax at 4%, which is illegal.
Further, the penalty under Section 12(3) can be levied only for an assessment made under Section 12(2), i.e. original order of assessment. The revised order passed by the respondent is an assessment under Section 16 of the TNGST act, for which the penalty can be levied under Section 16(2) of the TNGST Act and not under Section 12(3) of the TNGST Act. Under such circumstances, the penalty cannot be levied. Hence, the respondent has no jurisdiction or authority to levy penalty for the revised assessment order. Hence, the revised order of assessment is illegal as also the penalty. An appeal against that order ought to have been filed on or before 6.2.1997. But the petitioner was on a mistaken impression that since the appeal has already been filed against the original order of assessment and the same is pending, it was not necessary to file an appeal against the impugned order. On 9.7.1997, the respondent sent his agent for collecting the tax and penalty due under the impugned order, the petitioner contacted his Advocate for necessary action. There is no power for the Appellate Authority to condone the delay beyond 30 days. Hence, the present writ petition has been filed.

3. No counter has been filed in this matter.

4. The learned counsel for the petitioner submitted that it is not the case of assessment on escaped turn over. The turn over has been intimated to the authorities, but it was claimed as consignment sale and hence exempted from tax. Theref ovisions of the Act for assessment based on best judgment cannot be invoked in this case. Only, under such circumstances, when the return was not submitted or when tax is imposed on the basis of best judgment, penalty can be levied under the provisions of Sec.12(3)(b) of the TNGST Act. At the most, in the present case, since the turnover has been shown in the return, only a tax can be levied on the turn over disclosed. Under those circumstances, penalty cannot be levied. Since imposition of penalty is not in accordance with law, the impugned order is liable to be set aside.

5. Further, amendment to Sec.12(3)(b) of the TNGST Act, 1959 came into force only on 01.07.2002. Therefore that provision cannot be invoked for imposing penalty on an assessment for the period prior to that. Hence, the impugned order imposing penalty is not legal and the writ petition is to be allowed.

6. Heard the learned counsel for the respondent on this aspect.

7. From the facts referred to in the affidavit and the arguments thereon, the impugned order has to be challenged only by way of appeal. But, the petitioner did not file an appeal. In fact he has stated the reasons or the circumstances for non-filing of the appeal against the revised order of assessment. Since the authorities have no power to condone the delay in filing the appeal, the present writ petition has been filed, as there is no other remedy. The learned counsel for the petitioner also submitted that the revised order of assessment itself is an illegal order not supported by any valid law, hence there is no prohibition for filing the writ petition challenging the same. This argument of the counsel for the petitioner is acceptable. For the reasons that the validity of the order is challenged, and also that there is no other remedy available, the writ petition is maintainable.

8. In this case, the petitioner has not concealed any turn-over. He has only claimed that for certain turn over he is entitled for exemption from levy of tax. Therefore, when that is rejected, it is only a tax levied on the turn over disclosed. It is not tantamount to tax on escaped assessment. Therefore, it cannot be considered as ' best judgment'. It is not a case of mere filing no returns or incomplete or incorrect return. Under Section 12(2) of the TNGST Act, "If no return is submitted by the dealer under sub-section (1) within the prescribed period, or if the return submitted by him appears to the assessing authority to be incomplete or incorrect, the assessing authority shall, after making such enquiry as it may consider necessary, assess the dealer to the best of its judgment". When such an assessment is made under sub-Section (2), the Assessing Authority shall, in addition to the tax assessed, direct the dealer to pay penalty in the same order of assessment as per the Act. This provision was amended on 1.7.2002, where penalty could be levied even when the assessment order is passed under sub-Section (1) to Section 12. Under Section 12 (1), regular assessment is made on the basis of the return filed. After, 2002, even when the assessment is made on the basis of the return filed under Section 12(1) or on the basis of 'Best Assessment' under Section 12(2), penalty is leviable under Section 12(3). This amended provision can be invoked only for any return submitted after 1.7.2002. In case of return filed prior to 1.7.2002, the penalty can be imposed only if assessment is made under Section 12(2). No penalty can be made when assessment is made under sub-Section (1) of Section 12. In this case, admittedly, the assessment is made on the return submitted prior to 1.7.2002. Therefore, when the exemption is claimed bona fide and that was rejected, it is an assessment made under sub-Section (1). Therefore, on the date when the return has been filed, the penalty cannot be levied under Section 12(3). In this case, penalty has been levied even for assessment of the tax on the basis of return filed, which is not a assessment by 'Best judgment' under Section 12(2). Therefore, the imposition of penalty is not legal. Hence, the impugned order imposing penalty alone is set aside. The writ petition is allowed as prayed for. No costs.

Index: Yes
Internet: Yes

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To

The Commercial Tax Officer,
Sivagangai.